

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTOINE L. RUNNER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. C14-0695-RSM-MAT

REPORT AND RECOMMENDATION RE:
SOCIAL SECURITY DISABILITY
APPEAL

Plaintiff Antoine Runner proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1961.¹ He has an 11th-grade education and previously worked as a prison clerk and garbage sorter. (AR 83-84, 98-99.)

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 Plaintiff protectively filed an application for SSI on April 26, 2011, and subsequently
2 amended his alleged onset date to his application date. (AR 77, 223-28, 235.) His application
3 was denied at the initial level and on reconsideration, and he requested a hearing. (AR 132-54.)

4 On September 6, 2012, ALJ Mary Gallagher Dilley held a hearing, taking testimony from
5 Plaintiff and a vocational expert (VE). (AR 73-106.) On November 29, 2012, the ALJ issued a
6 decision finding Plaintiff not disabled. (AR 38-57.)

7 Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on
8 March 4, 2014 (AR 2-5), making the ALJ's decision the final decision of the Commissioner.
9 Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision under 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
15 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had worked
16 after the alleged onset date, but the work activity did not rise to the level of substantial gainful
17 activity. (AR 40.) At step two, it must be determined whether a claimant suffers from a severe
18 impairment. The ALJ found severe Plaintiff's mood disorder. (AR 40.) Step three asks whether
19 a claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's
20 impairment did not meet or equal the criteria of a listed impairment. (AR 40-41.)

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
22 residual functional capacity (RFC) and determine at step four whether the claimant demonstrated
23 an inability to perform past relevant work. The ALJ found Plaintiff able to perform a full range

1 of work at all exertional levels, but with the following limitations: he is limited to “work
2 consistent with an 11th grade education and skills in reading and mathematics[.]” (AR 41.) He
3 can perform only simple, routine tasks; should have no contact with the general public; and
4 should have only superficial contact with co-workers. (*Id.*) With that RFC, the ALJ found
5 Plaintiff unable to perform past relevant work. (AR 55-56.)

6 The ALJ proceeded to step five of the sequential evaluation, where the burden shifts to
7 the Commissioner to demonstrate that the claimant retains the capacity to make an adjustment to
8 work that exists in significant levels in the national economy. With the assistance of a VE, the
9 ALJ found Plaintiff capable of performing representative occupations, including kitchen helper,
10 agricultural helper, and hand packer.

11 This Court’s review of the ALJ’s decision is limited to whether the decision is in
12 accordance with the law and the findings supported by substantial evidence in the record as a
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,
16 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the
17 ALJ’s decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954
18 (9th Cir. 2002).

19 Plaintiff argues the ALJ erred by (1) failing to include post-traumatic stress disorder
20 (PTSD) as a severe impairment at step two; (2) failing to specifically address an opinion written
21 by examining psychologist Kristi Breen, Ph.D., and rejecting opinions written by psychiatrist
22
23

Joan Davis, M.D., and psychologist Wayne Dees, Psy.D.;² and (3) discounting the credibility of Plaintiff's subjective statements. The Commissioner argues the ALJ's decision is supported by substantial evidence and should be affirmed.

Step Two

Plaintiff argues that the ALJ erred in excluding PTSD at step two. The Commissioner argues that any step-two error is harmless, because the ALJ considered all of Plaintiff's alleged limitations when assessing his RFC and determined whether those allegations were credible. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (failure to list impairment as severe at step two harmless where limitations considered at step four). Plaintiff argues that this error is not harmless because "[o]pinions erroneously set aside by the ALJ contain limitations flowing from [Plaintiff's] PTSD which were not accounted for by the ALJ." Dkt. 21 at 2. Because it appears that Plaintiff's step-two error is in fact enveloped within his arguments regarding the medical opinion evidence, the court will not address it separately.

Medical Opinion Evidence

Plaintiff challenges the ALJ's assessment of medical opinions provided by Drs. Breen, Davis, and Dees, arguing that the ALJ failed to individually address Dr. Breen's opinion and erred in discounting the opinions of Drs. Davis and Dees.

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-

² Plaintiff includes an additional assignment of error that restates the same arguments regarding medical opinions: Plaintiff contends that the ALJ erred in failing to include the social limitations noted by Drs. Breen, Davis, and Dees. Dkt. 16 at 11-14. Plaintiff also cites other opinions regarding his social limitations (Dkt. 16 at 13), but does not address the ALJ's assessment of that evidence or explain why the ALJ's assessment was erroneous. *See* AR 48, 54, 55 (ALJ's discussion of the evidence mentioned by Plaintiff). Accordingly, this error will be addressed in the context of the ALJ's assessment of the medical opinions.

1 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
2 contradicted by another physician, a treating or examining physician's opinion may be rejected
3 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396
4 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be
5 rejected without "specific and legitimate reasons" supported by substantial evidence in the
6 record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
7 1983)). The ALJ may reject physicians' opinions "by setting out a detailed and thorough
8 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
9 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881
10 F.2d at 751). Rather than merely stating her conclusions, the ALJ "must set forth [her] own
11 interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing *Embrey v.*
12 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

13 Dr. Breen examined Plaintiff in June 2011 for purposes of establishing DSHS benefits
14 eligibility. (AR 301-07.) Dr. Breen did not review any records (AR 301), and relied on
15 Plaintiff's description of his psychiatric history and symptoms (AR 302). Dr. Breen diagnosed
16 Plaintiff with mood disorder NOS and paranoid personality disorder, and noted a rule-out
17 diagnosis of learning disorder and/or attention deficit hyperactivity disorder. (AR 303.) Dr.
18 Breen opined that Plaintiff "may be capable of doing simple tasks away from other people."
19 (AR 304.)

20 The ALJ summarized Dr. Breen's findings (AR 45-46), and explained that she discounted
21 Dr. Breen's and other opinions due to the examiners' reliance on non-credible self-reporting,
22 without access to the entire record. (AR 45.) The ALJ also indicated that Dr. Breen's paranoid
23 personality disorder was questioned by reviewing psychologist Faulder Colby, Ph.D.: Dr. Colby

1 noted that Dr. Breen’s opinion fails to specify which diagnostic criteria Plaintiff met. (AR 52
2 (citing AR 355).)

3 Plaintiff argues that the ALJ “failed to individually address the opinion of Dr. Breen”
4 (Dkt. 21 at 2), but Plaintiff is mistaken. *See* AR 45-46, 52. The ALJ did point out that multiple
5 medical opinions suffered from the same deficit — namely reliance on Plaintiff’s self-report —
6 which Plaintiff apparently concedes. *See* Dkt. 21 at 3 (conceding that all of his examiners “relied
7 upon [his] reports, saw him on limited occasions and had limited knowledge of his record”).
8 Reliance on non-credible self-report is, however, a legitimate reason to discount a medical
9 opinion to the extent that the opinion is not supported by the provider’s own observations. *See*
10 *Ghanim v. Colvin*, 763 F.3d 1154, 1162-63 (9th Cir. 2014); *Bray v. Comm’r of Social Sec.*
11 *Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009); *Ryan v. Comm’r of Social Sec. Admin.*, 528 F.3d
12 1194, 1199-1200 (9th Cir. 2008). The opinions of Dr. Breen, as well as Drs. Davis and Dees,
13 contain indications that the providers relied on Plaintiff’s subjective statements in rendering their
14 opinions. *See* AR 303-04 (Dr. Breen reiterating Plaintiff’s statements regarding functional
15 abilities), 322 (Dr. Davis reporting Plaintiff’s description of symptoms), 361-63 (Dr. Dees
16 reports Plaintiff’s description of symptoms, which Dr. Dees himself found to be unreliable).
17 Thus, because the challenged opinions do rely on Plaintiff’s subjective reporting — a fact which
18 Plaintiff does not dispute — the ALJ was entitled to discount those opinions to the extent that
19 they were based on Plaintiff’s self-reporting rather than clinical observations, because the ALJ
20 properly discounted Plaintiff’s credibility (as discussed *infra*).

21 Plaintiff more generally questions the logic of the ALJ’s assessment of the medical
22 evidence: if, as the ALJ stated, the medical opinions were so unreliable, due to dependence on
23 his subjective self-reporting without a longitudinal perspective, then the ALJ erred in crediting

1 any portion of the opinions of Drs. Breen, Davis, and Dees. Dkt. 21 at 3. According to Plaintiff,
2 the ALJ erred in not applying an “all or nothing” approach to the findings of Drs. Breen, Davis,
3 and Dees. Dkt. 21 at 3.

4 Plaintiff’s argument overlooks the reality of the medical opinions at issue: some portions
5 of the opinions are supported by the providers’ observations, and some portions are not, which
6 defies an all-or-nothing approach. For example, Drs. Breen and Dees tested Plaintiff’s ability to
7 understand and follow simple and complex instructions, and opined that based on his
8 performance during the examination, they believed Plaintiff could perform simple, but not
9 complex, tasks. (AR 303, 362-63.) Dr. Davis indicated that her opinion about Plaintiff’s ability
10 to perform simple tasks was based on her testing of Plaintiff’s memory. (AR 324.) But all three
11 providers cited at most Plaintiff’s own self-report when finding him incapable of working around
12 anyone or in handling workplace stress, or occasionally provided no support or rationale
13 whatsoever for their opinions. (AR 302, 324, 362.) The ALJ was entitled to consider the entire
14 content of the providers’ opinions, and determine which portions were supported and consistent
15 with the record, when weighing the probative value of the opinions. *See* 20 C.F.R. §
16 404.1527(c). Plaintiff cites no authority for his argument that the ALJ must either wholly accept
17 or wholly reject a medical opinion, and the Court is not aware of any authority requiring such an
18 approach. Accordingly, because Plaintiff has failed to identify an error in the ALJ’s assessment
19 of the medical opinion evidence, the ALJ’s assessment should be affirmed.

20 Credibility

21 The ALJ provided a number of reasons to discount the credibility of Plaintiff’s subjective
22 statements, including (1) Plaintiff’s inconsistent reporting of symptoms, (2) evidence that
23 Plaintiff overreported his symptoms, and (3) inconsistency with Plaintiff’s work history. (AR

43-53.) An ALJ's reasons to discount a claimant's subjective statements must be clear and convincing. *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014).

Plaintiff first attacks the ALJ's adverse credibility determination on the grounds that no provider questioned his truthfulness, but that only the ALJ disputed his credibility. Dkt. 16 at 15, 19. This is incorrect. Dr. Dees believed Plaintiff overreported his depression symptoms. (AR 361.)

Plaintiff also argues that the inconsistencies in his reporting of symptoms could be interpreted in an unspecified way that would not undermine his credibility. Dkt. 16 at 15. This argument fails for two reasons: inconsistencies in a claimant's testimony are indeed a valid reason to discount the claimant's credibility. *See Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). Second, the ALJ is entitled to draw reasonable inferences from the record. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). Theorizing about an alternative explanation for Plaintiff's inconsistencies does not establish that the ALJ's interpretation was not reasonable.

Plaintiff specifically challenges the ALJ's findings regarding his inconsistent reporting of his childhood sexual abuse, arguing that such abuse is difficult to discuss and Plaintiff's reluctance to disclose it should not have been held against him. Dkt. 21 at 5. Even if that were true, the ALJ cited numerous other inconsistencies that do not involve reporting childhood abuse. For example, the ALJ cited examples where Plaintiff inaccurately reported his education history (AR 47), denied experiencing trauma flashbacks to Dr. Dees in June 2012 while endorsing the symptom in March 2012 (AR 47-48), failing to report witnessing prison violence to some providers but attributing all of his mental health symptoms to such trauma at other times (AR 43, 48). Plaintiff has not explained why these inconsistencies do not undermine his credibility.

1 Plaintiff also challenges the ALJ's interpretation of his work history: the ALJ found that
2 Plaintiff's work history as a drug dealer indicated his "ability to interact with his customers."
3 (AR 50.) Plaintiff argues that his experience as a drug dealer does not demonstrate an ability to
4 interact in a "substantial or consistent fashion," and that he might have been the type of drug
5 dealer that interacted by use of threats, which would not suggest an ability to interact
6 successfully in the workplace. Dkt. 16 at 18. Plaintiff misses the ALJ's point: the ALJ cited
7 evidence of Plaintiff's experience as a drug dealer as evidence inconsistent with his allegations
8 that he could not work with others or trust them ever since he was 15. (AR 50.) Plaintiff
9 admitted that he worked as a drug dealer, and was convicted as part of a conspiracy to distribute
10 drugs, after the age of 15; this evidence can be reasonably interpreted as evidence that is
11 inconsistent with Plaintiff's allegations.

12 The ALJ also noted Plaintiff was able to work full-time while in prison, which
13 undermines the credibility of Plaintiff's allegations that he has been unable to work ever since
14 his childhood abuse. *See Drouin v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992). The ALJ
15 went on to state that although Plaintiff testified that he quit his garbage-sorting job due to trouble
16 being around people, the job ended around the same time he returned to jail, suggesting that he
17 may not have actually quit. (AR 50.) The Court agrees that the ALJ merely speculated as to the
18 reason for the end of Plaintiff's job, without any evidence to support the ALJ's disbelief of
19 Plaintiff's testimony (AR 84). *See Social Security Ruling 86-8*, 1986 WL 68636, at *8 (Jan. 1,
20 1986) ("Reasonable inferences may be drawn, but presumptions, speculations and suppositions
21 should not be substituted for evidence."). This error is harmless in light of the ALJ's other valid
22 reasons supporting her adverse credibility determination. *See Carmickle v. Comm'r of Social*
23 *Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

CONCLUSION

For the reasons set forth above, the Court recommends this matter should be AFFIRMED.

DEADLINE FOR OBJECTIONS

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **March 27, 2015**.

DATED this 6th day of March, 2015.



Mary Alice Theiler
United States Magistrate Judge